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Constitutional Law--Trial on Two Offenses Arising from the Same Act--No Double Jeopardy Involved

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sought to discourage oppressive police practices. . . ."[19] But there have been other interpretations of *Escobedo* and for the final answer we will have to await the Court's decision.

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CONSTITUTIONAL LAW—TRIAL ON TWO OFFENSES ARISING FROM THE SAME ACT—NO DOUBLE JEOPARDY INVOLVED.—Appellant was indicted by the grand jury on charges of embezzlement. Prior to his trial for embezzlement, the grand jury returned thirty-two indictments against appellant for submitting false claims to the Pike County Board of Education, a political subdivision of the Commonwealth of Kentucky. Both the false claim and the embezzlement indictment covered the same moneys. The commonwealth attorney, feeling that appellant should be tried on a false claim indictment, filed a motion to dismiss the embezzlement charge. This motion was overruled, and trial proceeded on the embezzlement charge. The prosecution refused to introduce evidence, and the jury acquitted appellant. Shortly thereafter, appellant was tried on one of the false claim indictments and convicted.

On appeal, appellant contended, *inter alia,* that he had been put in double jeopardy by his conviction for submitting a false claim, maintaining his acquittal under the embezzlement indictment was a bar to the false claim action.

Held: Affirmed. The court found that embezzlement and falsifying a claim against a political subdivision are truly separate offenses, and also found that double jeopardy meant "a person may not be tried or prosecuted the second time for the same offense."[1] *Runyon v. Commonwealth,* 393 S.W.2d 877 (Ky. 1965).

The doctrine of double jeopardy is so ancient that it is impossible to trace its origin,[2] and its concept is firmly embedded in the common law and has been incorporated in most constitutions.[3] The Kentucky Constitution, echoing the prohibition of the fifth amendment of the United States Constitution, states in section 13, "No person shall, for the same offense be twice put in jeopardy of his life or limb. . . ."

In order for the double jeopardy prohibition to be invoked successfully, the accused must be tried twice for the same offense. It must

[19] *In re* Lopez, 42 Cal. 188, 398 P.2d. 380 (1965).

[1] Moss v. Jones, 352 S.W.2d 557, 558 (Ky. 1961).
[2] Mullins v. Commonwealth, 258 Ky. 529, 80 S.W.2d 606 (1935).
[3] Burch v. Commonwealth, 240 Ky. 519, 42 S.W.2d 714 (1931).

be remembered, however, that within one act there may be more than one offense with trial permitted for each offense. The holding in this case illustrates this concept of an act having more than one offense.

The crux of the matter revolves around the term "same offense." In 1796, an English court narrowed the definition of "offense," equating it with the legal theory on which the defendant is tried.[4] Consequently, applying this definition, a second trial based on the same factual situation alleged in the first indictment, but proceeding under a different legal theory, is not barred by the rule proscribing a second trial for the same offense.

The underlying theory is still used in defining "offense." This is evidenced by the test used by the court in deciding *Runyon*:

> The test to determine whether the acts committed at the same time and place constitute one or more offenses is, if the proof of what is set out in the second indictment would sustain it, then the two indictments are for the same offense. If what is set out in the second indictment when proved upon trial of the first indictment will not sustain it, then they are distinct offenses, and the conviction or acquittal of either is not a bar to the other.[5]

In *Basley v. Commonwealth*[6] it was held that where the defendant had robbed a safe after breaking into a house, there were two separate offenses: 1) robbery of the safe, and 2) burglary. Conviction for the robbery did not preclude prosecution for burglary. The act committed by the defendant was one continuous incident. It was only one "incident," but arising out of this one incident were two separate offenses, for which all the elements of each offense were present. Therefore, no double jeopardy was involved.

This same reasoning was used in *Runyon*, thereby leading to the court's determination that no double jeopardy existed.

There are some situations where a retrial for the same offenses does not constitute double jeopardy. When the accused seeks review of his conviction, double jeopardy cannot be said to exist since the accused himself requested the second trial. The accused is not being subjected to undue harassment by the state. Reasoning that the accused can appeal if there was error prejudicial to his defense, the Court in *Palko v. Connecticut*[7] permitted a state, pursuant to its statutes, to be accorded the same privilege when error prejudicial to the state was committed. The Court viewed this retrial not as an attempt to wear the accused out by a multitude of trials, but rather an

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[4] The King v. Vandercomb & Abbot, 2 Leach 708, 168 Eng. Rep. 455 (Ex. 1796).

[5] Easley v. Commonwealth, 320 S.W.2d 778, 779 (Ky. 1958).

[6] 320 S.W.2d 778 (Ky. 1958).

[7] 302 U.S. 319 (1937).

attempt to present a case against the defendant in trial free of substantial legal error.

The United States Supreme Court has held that for a state to try a defendant after he has been acquitted by a federal court is not a violation of the double jeopardy prohibition. Double jeopardy only protects a defendant from successive prosecutions by the same sovereign.[8]

As indicated, when there is more than one offense involved in the act which the accused allegedly committed, the accused may be prosecuted for each offense; *i.e.*, without incurring the double jeopardy prohibition. The offenses must be capable of standing alone with all the necessary elements of each offense present. It is the individual offenses that are being tried and not the "act."

Kentucky's definition of double jeopardy is built on the same concept of separate offenses arising out of the same act that has been used in many courts from early times. By being able to find two separate offenses in the act committed by Runyon, the court was able to apply this separate offense idea. This application permitted the court to affirm the lower court's decision that the defendant was not placed in double jeopardy by the second trial on the false claim indictment.

O. Lawrence Mielke

CRIMINAL LAW—SEARCH INCIDENT TO ARREST FOR TRAFFIC VIOLATION—PLAIN VIEW DOCTRINE—CONSENT.—The defendant was convicted of illegally transporting alcoholic beverages in local option territory. After arresting the defendant for reckless driving, the officer discovered the evidence necessary for the above conviction by looking through an opening between the fender and trunk lid of defendant's automobile. The arresting officer had to assume a crouched or bent-over position before the evidence was visible. After this disclosure the defendant consented to open the trunk. *Held:* Reversed. The mere fact of an arrest for a traffic or other minor violation does not give the arresting officer an absolute right to search the vehicle or premises indiscriminately. There was no reasonable basis for the officer's searching the trunk of the car in connection with the charge of reckless driving. The evidence was not "clearly" or "plainly" visible and the search was not accomplished with the voluntary consent of the appellant. *Johns v. Commonwealth*, 394 S.W.2d 890 (Ky. 1965).

In the past, several cases have upheld searches and seizures

[8] Bartkus v. Illinois, 359 U.S. 121 (1959).